

ARKANSAS SUPREME COURT

No. CR 06-492

NOT DESIGNATED FOR PUBLICATION

Opinion Delivered June 22, 2006

RANDY PANKEY
a/k/a Randy Panky
Petitioner

PRO SE MOTION FOR BELATED
APPEAL AND FOR APPOINTMENT
OF COUNSEL [CIRCUIT COURT OF
MILLER COUNTY, CR 2004-361-2,
HON. JIM HUDSON, JUDGE]

v.

STATE OF ARKANSAS
Respondent

MOTION FOR BELATED APPEAL
GRANTED; REMANDED FOR
DETERMINATION OF INDIGENCY

PER CURIAM

On December 10, 2004, judgment was entered reflecting that petitioner Randy Pankey, who is also known as Randy Panky, had been found guilty by a jury of sexual assault in the second degree and sentenced to 240 months' imprisonment. A fine of \$15,000 was also imposed. Petitioner was represented at trial by his retained attorney Michael A. Friedman. No appeal was taken from the judgment, and petitioner now seeks by timely motion to proceed with a belated appeal pursuant to Ark. R. App. P.–Crim. 2(e). Petitioner asserts that he informed Mr. Friedman within thirty days of the date the judgment was entered that he desired to appeal and was informed by Mr. Friedman that he did not do appellate work and that Mr. Friedman referred him to another attorney.

It is the practice of this court when a *pro se* motion for belated appeal is filed and the record does not contain an order relieving trial counsel to request an affidavit from the trial attorney in response to the allegations in the motion. The affidavit is needed to act on a motion for belated

appeal because Ark. R. App. P.–Crim. 16(a) provides in pertinent part that trial counsel, whether retained or court appointed, *shall* continue to represent a convicted defendant throughout any appeal, unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause. Nevertheless, a defendant may waive his right to appeal by his failure to inform counsel of his desire to appeal within the thirty days allowed for filing a timely notice of appeal under Ark. R. App. P.–Civ. 4(a). *Jones v. State*, 294 Ark. 659, 748 S.W.2d 117 (1988) (*per curiam*).

In his affidavit Mr. Friedman does not contest petitioner’s claim that he asked that an appeal be perfected. He states instead that he is not aware of any meritorious grounds for an appeal, but “upon reading the motion and authorities cited therein I concur that Mr. Pankey’s motion to file a belated appeal and for appointment of counsel should be granted.”

When the judgment is entered in a criminal case and the trial attorney is made aware by the convicted defendant that the defendant desires to appeal within the thirty-day period from the date of judgment for filing a notice of appeal, counsel is obligated to file a timely notice of appeal. *Spillers v. State*, 341 Ark. 749, 19 S.W.3d 35 (2000) (*per curiam*). The obligation to file the notice of appeal and to preserve the appeal by lodging at least a partial record in the appellate court is not affected by counsel’s inexperience with appellate work, the convicted defendant’s financial status, or counsel’s belief that the defendant could not prevail on appeal. *See Mallett v. State*, 330 Ark. 428, 954 S.W.2d 247 (1997) (*per curiam*); *see also James v. State*, 329 Ark. 58, 945 S.W.2d 941 (1997) (*per curiam*).

Likewise, retained counsel who has not been paid a fee for the appeal or who believes that his or her client is in fact indigent and cannot pay the costs of the appeal must nonetheless lodge a partial

record and seek to be relieved by the appellate court or to have the client declared indigent so that he, or other counsel, may be appointed to represent the convicted defendant on appeal. The obligation to preserve the appeal also exists if retained counsel believes the appellant to be capable, but unwilling, to pay the costs of the appeal.

In no event may counsel simply abandon an appeal. It is well settled that under no circumstances may an attorney who has not been relieved by the trial court fails to preserve an appeal when the convicted defendant timely communicates to counsel his desire to appeal. *Ragsdale v. State*, 341 Ark. 744, 19 S.W.3d 622 (2000) (*per curiam*); *Langston v. State*, 341 Ark. 739, 19 S.W.3d 619 (2000) (*per curiam*); *Mallett v. State*, *supra*; *Muhammad*, 330 Ark. 759, 957 S.W.2d 692 (1997) (*per curiam*); *James*, *supra*.; *Jackson v. State*, 325 Ark. 27, 923 S.W.2d 280 (1996) (*per curiam*).

In the instant case, as counsel does not contend that petitioner failed to make his desire to appeal known in a timely manner, counsel, who was not relieved by the trial court, was obligated to perfect the appeal and continue to represent petitioner until such time as he was permitted by the appellate court to withdraw. Counsel did not act to protect petitioner's right to appeal, and thus petitioner was left without the effective appellate representation guaranteed to a convicted criminal defendant by the Sixth Amendment. *See Pennsylvania v. Finley*, 481 U.S. 551 (1987). Counsel's failure to preserve petitioner's right to appeal was clearly error; thus, there is no need to require counsel to admit fault. *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004).

The direct appeal of a conviction is a matter of right, and a state cannot penalize a criminal defendant by declining to consider his or her first appeal when counsel has failed to follow mandatory appellate rules. *Franklin v. State*, 317 Ark. 45, 875 S.W.2d 836 (1994) (*per curiam*); *see Evitts v. Lucey*, 469 U.S. 387 (1985). Our clerk is directed to lodge the appeal with Mr. Friedman as attorney-

of-record.

Because we have no information beyond the bare assertions contained in petitioner's affidavit of indigency on whether he is indeed entitled to appointment of counsel or entitled to have the appeal record prepared at public expense, the question of whether petitioner is now indigent is remanded to the trial court for an evidentiary hearing and Findings of Fact. The burden of establishing indigency is on the person claiming indigent status. In considering whether a person is indigent, which is a mixed question of fact and law, some of the factors to be considered are: (1) income from employment and governmental programs such as social security and unemployment benefits; (2) money on deposit; (3) ownership of real and personal property; (4) total indebtedness and expense; (5) the number of persons dependent on the petitioner for support; (6) the able-bodiedness and the level of education of the petitioner; (7) whether the petitioner is in a position to obtain gainful employment. *See Hill v. State*, 304 Ark. 348, 802 S.W.2d 144 (1991) (*per curiam*).

The court is directed to enter its findings concerning whether petitioner is indigent within thirty days of the date of this opinion. The findings and the transcript of the evidentiary hearing should be tendered here within thirty days of the date the findings are entered in the trial court.

A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Motion for belated appeal granted; remanded for determination of indigency.